

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. S-2573

PETITION OF EDMOND AND BONNIE J. FRENCH

OPINION OF THE BOARD
(Opinion Adopted March 9, 2005)
(Effective Date of Opinion: April 13, 2005)

Case No. S-2573 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. On January 24, 2005, the Hearing Examiner held a hearing on the application, and on February 28, 2005, issued a Report and Recommendation for approval of the special exception.

The subject property is Lot 3 and 8, Block B, Colesville Farm Estates Subdivision, located at 507 Orchard Way, Silver Spring, Maryland, 20904, in the RE-1 Zone.

Decision of the Board: Special Exception Granted Subject
To Conditions Enumerated Below

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on March 9, 2005. After careful consideration and review of the record in the case, the Board adopts the Report and Recommendation and grants the special exception subject to the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witnesses and representations of counsel identified in this report.
2. The Petitioners are bound by the condition set out in the Memorandum of Wright A. Jolly, Jr., Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 11(a)), that Petitioner will house no more than two unrelated persons, or a family of two, in the accessory apartment;

3. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
4. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and
5. Petitioners shall forfeit the accessory apartment special exception if and when title or development rights to Lot 8 are ever transferred separately from Lot 3 or if Lot 8 is itself developed independently from Lot 3.

On a motion by Donna L. Barron, seconded by Wendell M. Holloway, with Louise L. Mayer, Angelo M. Caputo and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 13th day of April, 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

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I. STATEMENT OF THE CASE

Petition No. S-2573, filed on February 21, 2003, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an existing accessory apartment use in a single-family residential structure located at 507 Orchid Way, Silver Spring, Maryland. The subject property is designated Lots 3 and 8, Block B, in the subdivision known as Colesville Farm Estates. It is zoned RE-1 (Residential, One-family, One-Acre, Detached), and the Tax Account Number is 00310503.

The Department of Housing and Community Affairs inspected the property on June 4, 2003, and found no items requiring correction, as evidenced by the memorandum of Wright A. Jolly, Jr., dated June 9, 2003 (Exhibit 11(a)).¹ Nevertheless, this case has a more tortured history than the run-of-the-mill accessory apartment case. It was filed just over two years ago, but ran into an unusual roadblock resulting from the fact that Petitioners' property consists of two adjacent lots which have never been formally subdivided into one parcel. The Petitioners' home, which is located on Lot 3, is not set back from the lot line it shares with lot 8 by the distance required under the applicable zoning ordinance. Thus, when Petitioners appeared for their hearing before the Board of Appeals (BOA) on June 25, 2003, they were met with a recommendation of deferral by the Technical Staff of the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report dated June 19, 2003 (Exhibit 12).² The Board began its hearing, but adjourned without completing it to give Petitioners the opportunity to either provide a boundary survey establishing exactly how much setback existed or to apply for a minor subdivision, as suggested by Technical Staff, formally joining the two lots into one. BOA Tr. 35.³

On February 23, 2004, Susan Scala-Demby, Permitting Services Manager of the Department of Permitting Services (DPS) sent Petitioners' attorney a letter (Exhibit 31) indicating that DPS interpreted Zoning Ordinance §59-G-2.00(c)(1) as permitting the "two lots in to be treated as one for compliance with all standards." On March 9, 2004, armed with the supporting DPS letter, Petitioners' attorney sent a letter (Exhibit 24) to the Board of Appeals outlining Petitioners' various legal arguments that they are entitled to the special exception they seek. Petitioners' attorney followed up on March 10, 2004, with a letter (Exhibit 25) to the BOA requesting that the matter be referred to the Office of Zoning and Administrative Hearings (OZAH) so that a hearing could be scheduled. In a resolution effective March 31, 2004 (Exhibit 26(a)), the Board referred the matter to OZAH to hold a hearing and write a report. On the same date, Notice (Exhibit 26(b)) was issued by the Board scheduling the hearing before OZAH for September 13, 2004.

At Petitioners' request (Exhibit 27), the hearing was postponed until January 24, 2005 (Exhibit 28). The hearing was held, as scheduled, on January 24, 2005, with the only witnesses being Petitioners, Housing Code Inspector Wright Jolly, and Technical Staffer, Sandra Youla. Petitioners conceded at the hearing that the setback in question does not meet the applicable zoning standard if the lots are treated separately (Tr. 8 and 43), but they have elected not to undergo a minor subdivision, arguing instead that they are entitled to

¹ Housing Code Inspector Jolly found that the accessory apartment had 342 square feet of habitable space and therefore should be occupied by no more than two unrelated individuals or a family of two.

² Technical Staff reports are frequently quoted and paraphrased herein.

³ References to the transcript of the Board of Appeals June 25, 2003, hearing are labeled "BOA Tr. xx," while references to the transcript of the Hearing Examiner's January 24, 2005 hearing are labeled "Tr. xx."



As noted by Technical Staff, the total area of the subject property is approximately 48,368 square feet (1.1 acre): Lot 3 is 21,778 square feet, and Lot 8 is 26,590 square feet. Only Lot 3 abuts the street, and has a street frontage of 160.01 feet. Lot 8 is behind Lot 3, and Lot 8 abuts a “paper street” (Somerset Lane) that was never built. Both Lots 3 and 8 are mainly rectangular in shape and are fairly flat. Lot 3 contains the house, existing accessory apartment, and u-shaped driveway; Lot 8 is undeveloped but contains a portion of the rear patio and rear parking area for the house on Lot 3. The lots were recorded on March 25, 1947, as per the Plat attached to the Technical Staff report. Technical Staff described the property as a one and a half story brick house, with “mature landscaping,” and an existing accessory apartment on ground level, in the former garage.

The accessory apartment is entered from the rear of the house through a totally enclosed porch that is shared by the accessory apartment and main unit in the house. There is a rear patio and a paved, u-shaped, driveway that is approximately 10 to 12 feet wide and about 180 feet long. It can accommodate eight cars (albeit blocking each other in). There is also a paved driveway extension off the u-shaped driveway along the east side of the house that leads to a 188.45 square foot paved parking area in the rear that can accommodate four to six cars. A brick walkway leads from the u-shaped driveway to the front door of the house, and a walkway of stone pavers leads from the driveway extension to the front door of the house. In addition, a brick walkway leads from the rear parking area to the entrance of the enclosed porch. The accessory apartment can be entered through the shared porch or by a patio door that opens onto an asphalt walkway which runs along the rear portion of the accessory apartment. There is a wooden fence that runs along western property line of Lot 8; otherwise the property is not fenced. The property can be seen in the following photographs from Exhibit 6(c):



Accessory
Apartment

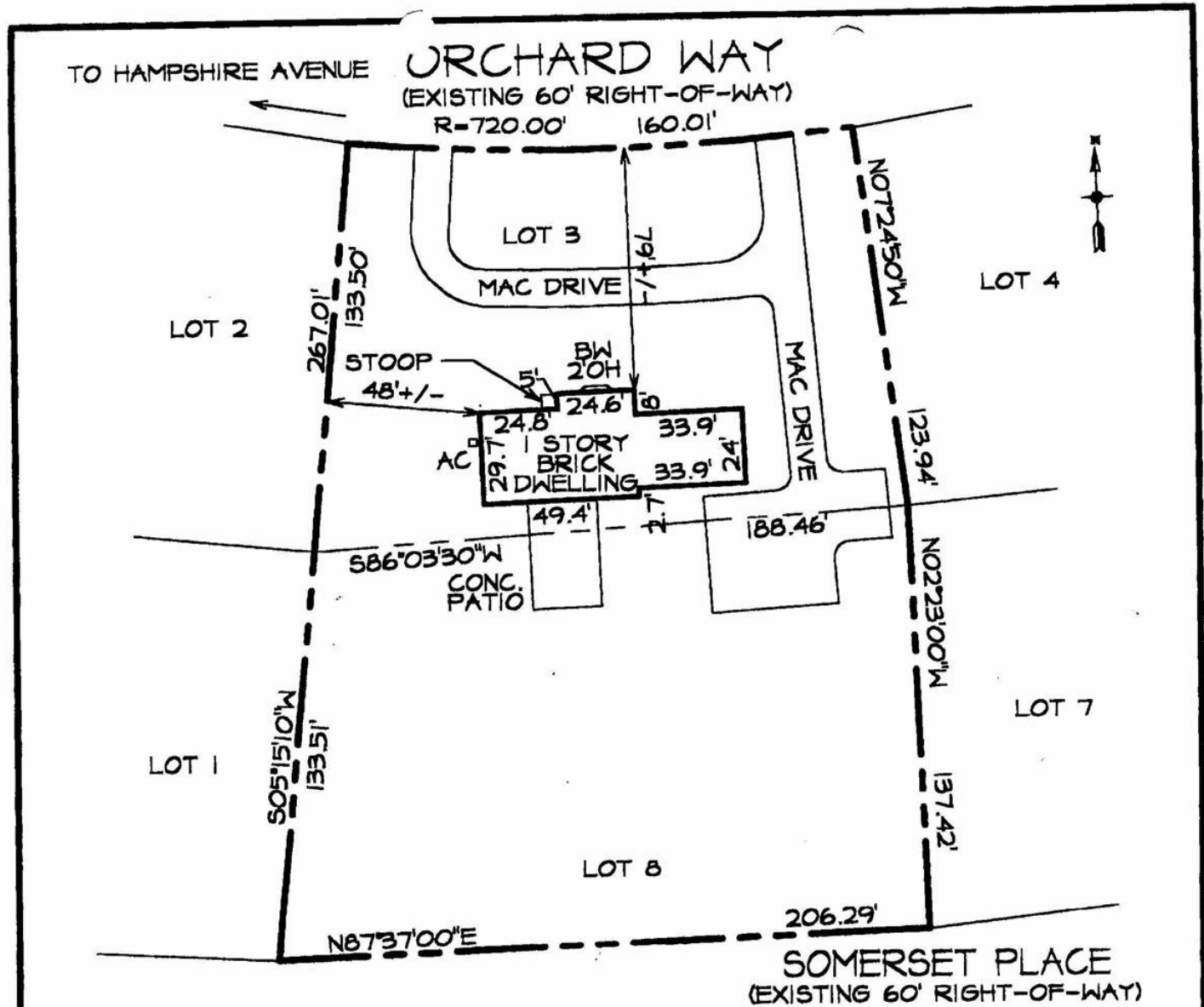
Figure 1 of 5 - Front of House

Main
House



Figure 2 of 5 - Driveway and Apartment

Shown below is the Site Plan (Exhibit 4), which can be used to illustrate the troublesome legal issue in this case.



B. The Central Issue

As can be seen, the house, which contains the accessory apartment, is located near the southern lot line of Lot 3, which is also the northern lot line of Lot 8. Lot 8 is currently undeveloped, except for portions of the concrete patio and the 188.45 square foot paved parking area connected to the driveway extension. There is no measurement on the Site Plan that shows the precise distance from the rear of the dwelling to the internal lot line; however, Petitioners attempted to calculate it in Exhibit 17, which is a copy of the Site Plan with the following calculations introduced by Petitioners at the June 25, 2003 Board hearing.

The Site Plan shows that the distance from the northern lot line of Lot 3 (*i.e.*, the

street line at Orchard Way) to the house as 79 feet. The length of the house, from its front building line to its rear building line, is shown as 5 feet plus 29.7 feet, yielding a total house length of 34.7 feet. Adding that figure to the 79 foot front setback yields a total measurement of 113.7 feet from the Orchard Way street line to the rear building line of the house. Petitioner then subtracted that figure from the length of the west side lot line shown on the Site Plan (133.5 feet) to arrive at the figure of 19.8 feet (*i.e.*, $133.5 - 113.7 = 19.8$) for the rear set back (*i.e.* the distance from the house to the lot line with Lot 8).

However, the lot line separating Lots 3 and 8 is not exactly parallel with the front lot line, and the distance between the front and rear lot lines of Lot 3 shows as only 123.94 feet on the eastern side. Subtracting 113.7 feet from that figure would yield a rear setback of only 10.24 feet. Thus, we know that the rear setback is somewhere between 10.24 feet and 19.8 feet, if Lots 3 and 8 are considered separate lots for determining setbacks.

Unfortunately that figure does not appear to meet the rear setback requirement specified for the applicable “A” Residence Zone in the 1945 *Off Street Parking Ordinance and Zoning Ordinance* (Exhibit 29), the Zoning law that was in effect when the lots were recorded in 1947.⁴ That ordinance required the following setback for rear yards:

There shall be a rear yard, having a minimum average depth of twenty feet but in no case less than fifteen feet in depth at any one point.

Although one could argue that there is insufficient information to determine the “average depth” in this case, Petitioners have elected to concede that the rear setback is inadequate, if Lots 3 and 8 are treated as separate lots for this purpose. Tr. 8 and 43. They argue, however, that their petition should be granted for any one of four reasons:⁵

⁴ The current RE-1 Zone requires a 35 foot rear yard setback; however, Technical Staff determined that the dimensional standards of the old “A” Residence Zone applied, rather than those of the current RE-1 Zone. The Staff Report did not state why the Zone in effect when the lot is recorded should be controlling with regard to developmental standards, and Footnote 1 to Zoning Ordinance §59-C-1.3 (p. C1-18), entitled *Development Standards on Residential Zones*, muddies the waters by providing, in relevant part:

The following lots shall have the area and dimensional requirements of the zone applicable to them prior to their classification in the RE-2, RE-2C, and RE-1 zones: (1) A record lot approved for recordation by the planning board prior to the approval date of the most recent sectional map amendment that included the lot; and (2) A lot created by deed on or before the approval date of the most recent sectional map amendment that included the lot, . . .

The problem is that the statute refers to the “zone applicable . . . prior to their reclassification” to RE-1, but it does not say whether the “prior” zone is the immediately prior zone or the prior zone when the lots were platted. In the subject case, the lots were recorded on March 25, 1947, in the “A” Residence Zone; however, they were rezoned R-R (Rural Residential) in 1954, and that classification was later renamed to R-200 in 1973. They were then rezoned to from R-200 to RE-1 by Sectional Map Amendment (SMA) G-337 on March 16, 1982. The RE-1 Zone was reaffirmed by SMA G-746, on July 8, 1997. Although the Hearing Examiner takes official notice of this zoning history, it is not dispositive of which zone’s standards should apply, and the Hearing Examiner therefore relies on the expertise of the Technical Staff in stating that the “A” Residence Zone’s dimensional standards should apply because that was the zone in effect when the lots were recorded. Petitioners, through counsel, agree. Tr. 7.

⁵ The first three legal arguments were outlined in the March 9, 2004 letter from Petitioners’ attorney to the

1. Zoning Ordinance §59- G-2.00(c)(1) requires that Lots 3 and 8 be treated as one lot with regard to all developmental standards.
2. The existing structure is exempt from Rear yard setback requirements pursuant to the “Exemptions from Controls” provided in Zoning Ordinance §59-B-5.1 and 5.3.
3. The County is prevented from enforcing the rear yard setback by Maryland Annotated Code, Courts and Judicial Proceedings Article, Section 5-114(b)(2), which imposes a three year statute of limitations on setback violations for structures erected under “an otherwise valid building permit.”
4. The use by a single owner of contiguous lots effectively merged the lots for zoning purposes pursuant to the Maryland Court of Appeals decision in *Friends of Ridge v. Baltimore Gas and Electric Company*, 352 Md 645, 724 A.2d 34 (1998), thereby eliminating the setback requirements for “internal lot lines.”

Petitioners’ First Argument: Zoning Ordinance §59- G-2.00(c)(1) requires that Lots 3 and 8 be treated as one lot with regard to all developmental standards.

Zoning Ordinance §59-G-2.00(c)(1) contains certain land use requirements that pertain only to evaluation of petitions for accessory apartments. That subsection provides:

(c) *Land use requirements:*

(1) *The minimum lot size is 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

It is undisputed that the second sentence of this provision requires the two lots in question to be treated as one for purposes of determining compliance with the minimum lot size, since the subject property does contain “*a single one-family detached dwelling lawfully constructed prior to October, 1967.*” The real question is whether the next sentence (“*All other development standards of the zone must also apply, including setbacks, . . .*”) means that the other standards are applied to each lot separately or to both taken together, as with the minimum area requirements. Technical Staff argues that setbacks should be determined by individual lots because each lot could be sold separately, thereby leaving the structure on Lot 3 too close to the adjacent Lot 8.

The Department of Permitting Services (DPS) disagrees with Technical Staff, as

Board of Appeals (Exhibit 24), and the fourth one was raised in the February 1, 2005, letter from Petitioners’ counsel to the Hearing Examiner (Exhibit 32). The former letter also discusses the propriety of a variance, but one has not been sought in this case and that issue is therefore not before the Hearing Examiner.

evidenced by the February 23, 2004, letter of Susan Scala-Demby, Permitting Services Manager (Exhibit 31). In that letter, DPS interprets Zoning Ordinance §59-G-2.00(c)(1) as permitting the “two lots in to be treated as one for compliance with **all** standards.” [Emphasis supplied.] In other words, DPS believes that the two lots should be considered as one for all development-standard purposes, not just for computing minimum lot size. DPS is the agency that is mainly responsible for administering this provision, and therefore the agency’s opinion is entitled to deference. As stated in *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086), “We must respect the expertise of the agency and accord deference to its interpretation of a statute that it administers.” The Hearing Examiner finds that, were it not for the provision, “*All other development standards of the zone must also apply, including setbacks . . .*,” Technical Staff would be correct. Each lot should be considered individually. However, the language of §59-G-2.00(c)(1), which applies only to accessory apartments, changes the calculus to some degree.

We must seek to interpret the provision in an effort give effect to the Council’s legislative intent. As stated in *Dyer v. Otis Warren Real Estate Co.*, 371 Md. 576, 581, 810 A.2d 938, 941 (2002),

The “cardinal rule” of statutory construction “is to ascertain and effectuate legislative intent.”; “ ‘To this end, we begin our inquiry with the words of the statute and, ordinarily, when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we end our inquiry there also.’ ” (quoting *Mayor & City Council of Baltimore v. Chase*, 360 Md. 121, 128, 756 A.2d 987, 991 (2000)).

Unfortunately, the provision in question is ambiguous and could reasonably be interpreted either way. It was adopted by the Council on December 2, 1983, in Ordinance No. 10-13, along with other provisions that created the accessory apartment special exception. The legislative history does not help much in our endeavor, but the Opinion accompanying the legislation does emphasize making “more efficient use of the existing housing stock in a manner consistent with residential one-family neighborhoods” (See attachments to Exhibit 32.).

As applied to this unusual case, Technical Staff’s interpretation does not help us to the “more efficient use of the exiting housing stock” sought by the Council; rather, Technical Staff makes a distinction with no practical difference in this case because whether or not the accessory apartment is approved, the building in which it would be located will remain in the same place, about 15 feet from the lot line. Thus, if Lot 8 were sold separately (Technical Staff’s concern), the new owner will have a building located on Lot 3 which is closer to the lot line than called for in the Zoning Ordinance, whether or not there is an accessory apartment on Lot 3. Given this fact, the Hearing Examiner sees little benefit in applying Technical Staff’s more restrictive interpretation to this particular set of facts (*i.e.*, house constructed prior to October, 1967, entirely on one lot, but part of a two-lot property under single ownership, where the proposed accessory apartment use will not change the impact of the setbacks on adjacent properties).

The Hearing Examiner is not concluding that DPS’s interpretation of the Zoning Ordinance is correct under all factual scenarios, but rather that it is the most sensible

interpretation as applied to these peculiar facts. Moreover, the concerns raised by Technical Staff can be well addressed by a condition that allows Petitioners to have the accessory apartment, if Petitioners meet all the other criteria, but requires Petitioners to forfeit the special exception if and when Lot 8 is ever transferred separately from Lot 3. Petitioners have agreed to such a condition. Exhibit 32 at page 3.

The other three arguments are discussed briefly below, but they need not be decided because the Hearing Examiner finds the first argument persuasive, given the facts of this case.

Petitioners' Second Argument: The existing structure is exempt from Rear yard setback requirements pursuant to the "Exemptions from Controls" provided in Zoning Ordinance §§ 59-B-5.1 and 5.3.

In this argument, Petitioners rely on special provisions of the Zoning Ordinance for conditions predating 1958. These provisions are found in Zoning Ordinance §§ 59-B-5.1 and 5.3.

Sec. 59-B-5.1. Buildable lot under previous ordinance.

Any lot that was recorded by subdivision plat prior to June 1, 1958, or any lot recorded by deed prior to June 1, 1958 that does not include parts of previously platted properties, and that was a buildable lot under the law in effect immediately before June 1, 1958, is a buildable lot for building a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone. Any such lot may be developed under the zoning development standards in effect when the lot was recorded except that:

(a) *a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District must meet the development standards in the 1928 Zoning Ordinance;*

(b) *any new one-family dwelling on a lot legally recorded by deed or subdivision plat before June 1, 1958, in the Upper Montgomery County Planning District must comply with the standards set forth in Section 59-B-5.3(b);*

(c) *the maximum building height and maximum building coverage for any building or structure must comply with the current standard of the zone in which the lot is now classified. In addition to compliance with the maximum building height and the maximum building coverage standards, any building or structure constructed pursuant to a building permit issued after August 24, 1998 that conforms to the lot area and width standards of the zone in which the lot is classified must comply with the current yard requirements of the zone in which the lot is classified; and*

(d) *an established building line setback must conform to the standards for determining the established building line in effect for the lot when construction occurs. Any building permit issued before November 23, 1997 must conform to the development standards in effect when the lot was recorded.*

Sec. 59-B-5.3. One-family dwelling.

Any one-family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is not a nonconforming building. The dwelling may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded, except that:

(a) *a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District, must meet the development standards in the 1928 Zoning Ordinance;*

(b) *one-family dwellings and accessory structures on a lot legally recorded by deed or subdivision plat before June 1, 1958, in the Upper Montgomery County Planning District must comply with the setback, yard, and area coverage standards applicable to the lot in the 1956 Zoning Ordinances for the Upper Montgomery Planning District;*

(c) *the maximum building height and maximum building coverage in effect when the building is altered, renovated, or enlarged, applies to the building; and*

(d) *an established building line setback must conform to the standards for determining the established building line in effect for the lot when any alteration, renovation, or enlargement occurs. Any building permit issued before November 23, 1997 must conform to the development standards in effect when the lot was recorded.*

Petitioners argue that they have proposed no structural modification to the existing dwelling, nor proposed any change to the property which triggers a rear yard setback different from that which has applied to the property for the past fifty years. “[U]ntil Petitioners propose such a change to the existing dwelling, this Property is a pre-1958, not non-conforming, legal lot with a legal non-compliant rear yard setback.” Exhibit 24, page 4. Therefore, they urge that the structure is exempt from rear yard setback requirements per Sections 59-B-5.1 and 5.3.

Technical Staff responded to this argument in an e-mail (Exhibit 23), arguing that the quoted provisions

“appl[y] only to the land use known as single-family dwelling and not to

any other type of land use. . . . Accessory apartments, while existing within one family dwellings, are separate land uses. Further, accessory apartment are special exceptions. As such, accessory apartments are discretionary, and may only exist if they meet development standards. . . . Whenever any part of a single-family dwelling is converted to another land use, the developments standards for that land use apply, whether or not the structure is altered, renovated, enlarged, or replaced to accommodate that new land use. This structure does not, apparently, meet the rear yard setback requirement. Consequently, I do not agree that Sections 59-B-5.1 and 5.3 exempt the structure, when used for an accessory apartment, from the rear yard setback requirements.

The Hearing Examiner tends to agree with Technical Staff's analysis on this point, although it is unnecessary to reach this issue. Nevertheless, another section of the Zoning Ordinance, not cited by Petitioners, further clouds the analysis. Zoning Ordinance §59-C-1.34 provides:

Sec. 59-C-1.34 Existing buildings and building permits.

(a) Any building or structure for which a building permit was issued, and any lawful use which was instituted on property reclassified to the RE-2, RE-2C or RE-1 zone prior to the date of enactment of the last approved sectional zoning map amendment, where such lot was rezoned to the RE-2, RE-2C or RE-1 zone by sectional map amendment, shall not be regarded as a nonconforming use. Such building or use may be structurally altered, replaced or repaired, or may be enlarged in conformance with the requirements of the previous zone, so long as it remains an otherwise lawful use as previously allowed.

Technical Staff characterizes this section as “one of our zoning ordinance's great examples of poor drafting – it mixes up buildings and uses and doesn't say all that it needs to say.” E-mail of July 29, 2004, page 2 (Exhibit 33). What it does say appears to allow any lawful structure or use rezoned to RE-1 by sectional map amendment to remain a lawful use or structure even if altered in conformance with the previous zone's development standards. Thus, this section supports the application of the previous zone's development standards, as we have done in this case. It does not support (or defeat) the grant of a special exception for an accessory apartment on the property at this time because, in the absence of a special exception in existence at the time of the 1982 sectional map amendment which rezoned this property RE-1, this accessory apartment was not a lawful use at that time. In any event, under Argument One, above, the two lots, when considered as one, will meet all the development standards of the old zone, consistent with the language of this statutory provision.

Petitioners' Third Argument: The County is prevented from enforcing the rear yard setback by Maryland Annotated Code, Courts and Judicial Proceedings Article,

Section 5-114(b)(2), which imposes a three year statute of limitations on setback violations for structures erected under “an otherwise valid building permit.”

In their third argument, Petitioners rely on Maryland State law. They cite Maryland Annotated Code, Courts and Judicial Proceedings Article, Section 5-114(b)(2), which provides:

A governmental entity may not initiate an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred if the building or structure was constructed or reconstructed:

(i) In compliance with an otherwise valid building permit, except that the building permit wrongfully permitted the building or structure to violate a setback line restriction; or

(ii) Under a valid building permit, and the building or structure failed to comply with a setback line restriction accurately reflected in the permit.

Given the statutory language, Petitioners argue that it is too late for the County to “enforce” the setback in question. On this one, the Hearing Examiner agrees with Technical Staff’s response, which is that the County is not “initiat[ing] and action” seeking to enforce a setback; rather, the Petitioners are coming to the County seeking permission to legitimize a new land use, an accessory apartment. However, once again, this is a moot point since Petitioners qualify for the accessory apartment special exception under Argument One, above.

Petitioners’ Fourth Argument: The use by a single owner of contiguous lots effectively merged the lots for zoning purposes pursuant to the Maryland Court of Appeals decision in *Friends of Ridge v. Baltimore Gas and Electric Company*, 352 Md 645, 724 A.2d 34 (1998), thereby eliminating the setback requirements for “internal lot lines.”

Petitioners’ fourth argument is based on the Maryland Court of Appeals decision in *Friends of Ridge v. Baltimore Gas and Electric Company*, 352 Md 645, 724 A.2d 34 (1998). In that case, the Court held that the use by a single owner of contiguous lots effectively merged the lots for zoning purposes, eliminating the need for a variance to satisfy setbacks from the internal lot line separating the two lots. The problem with applying the ruling in the *Friends of Ridge* here is that the Court in *Friends of Ridge* was

applying Baltimore County law, which differs to some extent from the Montgomery County law, as is currently being argued by Montgomery County before the Maryland Court of Appeals in the case of *David Remes v. Montgomery County*. Fortunately, we do not need to reach the *Friends of Ridge* issue (or any of the other issues discussed above) to decide our case, given the specific provision of the Zoning Ordinance (§59- G- 2.00(c)(1)) which applies only to accessory apartments, and permits the two lots at issue in our case to be considered as one, per the discussion regarding Argument One.

C. The Proposed Use

According to Petitioners' statement (Exhibit 3), accompanying their application, they purchased the subject property in 2001. A copy of the deed to the premises (an item that had not yet been filed when Technical Staff filed their report) is in the record as Exhibit 15. The accessory apartment was present when they purchased the home, apparently having been created within an existing, attached two-car garage in 1983 or thereabouts. The five-bedroom house is about 50 years old. Exhibit 3.

Petitioners describe the accessory apartment as follows:

The apartment is part of our existing one-family dwelling, and is in excellent condition and newly carpeted. It contains a moderate-sized bedroom, moderate-sized living and dining room, kitchen (including sink, counter, refrigerator, oven, and stovetop), and bathroom (including bathtub and shower, sink, and toilet). Overall size of the apartment is 24' by 24'. Entrance into the apartment is through a common porch (totally enclosed) between the apartment and the house. Entrance to the apartment is from the back of the house via an enclosed porch. The entrance is located so that the appearance of the one-family dwelling is preserved. Four parking spaces are available at the side and rear of the house. [Exhibit 3]

The entranceway from the enclosed porch and the parking in the rear of the house can be seen on the photos from Exhibits 6(a) and (b) shown below and on the following page.

Exhibit 6(a)



Figure 5 of 5 – Entrances
Left – Apartment
Middle – Backyard
Right – Main House

Exhibit 6(b)



Figure 3 of 5 – Rear of House



Figure 4 of 5 – Parking at Rear of House

Edmond B. and Bonnie J. French, 507 Orchard Way, Silver Spring, MD 20904

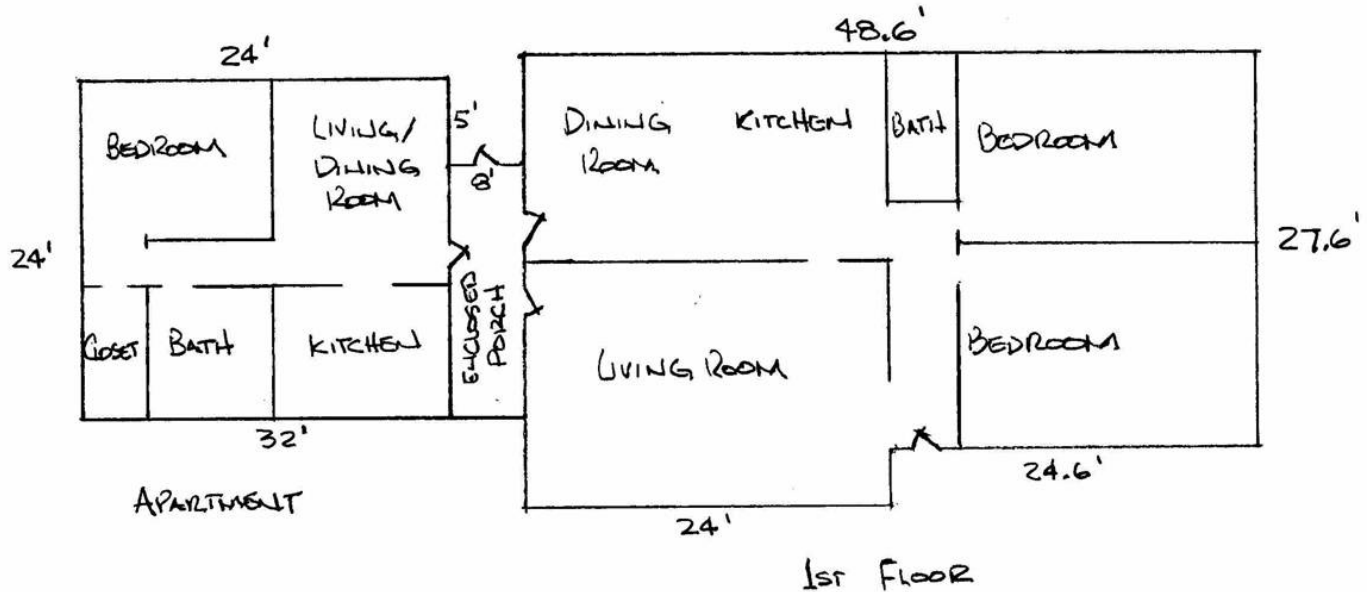
Technical Staff found that parking is more than adequate, given that eight cars can be parked in the u-shaped driveway, and between four to six cars in the parking area to the rear and east of the house. Only two on-site spaces are required. Staff did not count on-street parking toward meeting the requirement, given the narrowness of Orchard Way and its lack of a curb.

Petitioners state that during their first year of ownership, the apartment was vacant except that occasionally it served as a guest room for extended family. Exhibit 3. They rented the apartment in August of 2002 to a tenant who stayed until December 2004. A new tenant has been living there since January of 2005. Tr. 22.

Technical Staff's report recited the following additional information learned from Petitioners:

- the main unit is occupied by the applicants, a married couple, and their five children;
- the lots do not contain a family of unrelated persons, guest room for rent, boardinghouse, or registered living unit;
- the accessory apartment will have the same street address as the main unit;
- the apartment had previously been a registered living unit under the prior owner. (Staff contacted staff at the Department of Housing and Community Affairs, who confirmed that a registered living unit had been created in 1991 in the former garage.); and
- The applicants will not receive compensation for the occupancy of more than one dwelling unit.

The Floor Plan (Exhibit 5) shows an apartment with a bedroom, closet, hallway, living/dining area, bathroom, and kitchen. According to the floor plan, the apartment is 24 feet by 24 feet, which Technical Staff says is in general agreement with dimensions shown on the submitted survey plan. Hence the



gross floor area of the apartment is 576 square feet, based on the floor plan. Wright Jolly, the Housing Code Inspector, determined that the habitable floor space is 342 square feet, allowing the apartment to be occupied by no more than two unrelated persons or a family of not more than two. Exhibit 11(a). Petitioners are agreeable to that restriction (Tr. 26), and Mr. Jolly raised no other issues in his report and testimony. Tr. 27-29. The Floor Plan (Exhibit 5) for the accessory apartment and the first floor of the house is shown below:

Petitioners' Landscape Plan (Exhibit 7) demonstrates ample landscaping to screen their property from the neighbors.

D. The Neighborhood and its Character

The neighborhood is residential in character and consists of mainly one family



homes, on land zoned RE-1. Technical Staff recommended defining the boundaries of the neighborhood as New Hampshire Avenue on the west; the RE-1 zone line on the north, which runs along the rear lots lines of the properties on the north side of Hobbs Drive; the RE-1 zone line on the east (part of which runs along Grassmere Road); and Midland Road and Fairland Road on the south. The Hearing Examiner believes that Technical Staff's neighborhood definition is a little too inclusive given the negligible impact expected from this small accessory apartment located in well-landscaped house, set far back from the road and providing more than adequate parking. In the Hearing Examiner's opinion, the neighborhood boundaries should be New Hampshire Avenue to the west; Hobbs Road to the north, Somerset Lane and Berkley Road to the east and Copely Lane to the South, as drawn on the following map attached to the Technical Staff report.

Staff found one other active special exception in the neighborhood, S-1099, an accessory apartment at 606 Orchard Way, approved on April 17, 1985.⁶

There has been no opposition from the neighborhood to the instant petition.

E. The Master Plan

The subject property is covered by the *1997 White Oak Master Plan*. The property is zoned RE-1 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the RE-1 Zone. The Master Plan notes that the White Oak Master Plan area "offers a variety of housing," and seeks to "continue to provide a variety of housing types." Page 18. On the same page, the Plan recommends encouraging the development of "a variety of housing types for all income ranges."

As noted by the Technical Staff, accessory apartments are a good source of affordable housing. Moreover, the Hearing Examiner takes official notice of a recent study by the M-NCPPC concluding that

[accessory apartments] can be an excellent solution to the shortage of affordable housing by producing extra income for homeowners, dispersing the supply of moderate-cost housing more uniformly throughout the community, contributing to the tax base, reducing sprawl by providing more concentrated urban housing opportunities, and providing a means for extended family members to live together in a single site.

(Housing Montgomery: A Menu of Options for a Dramatic Increase in the Supply of Housing for our Workforce, 3/6/06, Montgomery County Planning Board Agenda Item #1)

The accessory apartment in the subject case fits the goals of the Master Plan. "Protection of [the] existing residential communities is the main housing objective of the Plan" Page 6. In discussing Special Exceptions (page 24),

⁶ The report mentions two other special exceptions, but there was no information about one of them (S-866) and the other (S-1388) had been revoked.

the Plan's stated objective is to "Evaluate New Requests for special exception uses and their impact on the character and nature of the residential neighborhoods in which they are proposed." In this case, because Petitioners plan no external structural modifications to the clearly residential subject property, the requested special exception will maintain the residential character of the area.

The Plan also recommends avoiding "[e]xcessive concentration of special exception uses and non-residential uses along major transportation corridors" because such sites "are more vulnerable to over-concentration. . . ." Given that there is only one other active special exception in the neighborhood, over-concentration is not a problem in this case.

Other specific Recommendations of the Plan are:

- *Require new requests for special exception uses along major transportation corridors and in residential communities to be compatible with their surroundings. Front yard setback should be maintained.*
- *Avoid front yard parking because of its commercial appearance. Side and rear parking should be screened from view of surrounding neighborhoods.*
- *Require new building or any modification or additions to existing buildings to be compatible with the character and scale of the adjoining neighborhood.*
- *Avoid placing large impervious areas in the Paint Branch watershed due to its environmental sensitivity.*

Petitioners' proposal complies with all these recommendations, to the extent they are applicable. In sum, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the applicable *Master Plan*.

III. SUMMARY OF HEARING

Testimony at the hearing was provided by Petitioners, Edmund and Bonnie French, the Housing Code Inspector, Wright Jolly, and Sandra Youla of the Technical Staff.

Edmund French:

Mr. French and his wife have owned the property at 507 Orchard Way, Silver Spring, since February 2001. Mr. French previously gave testimony at the June 25, 2003 meeting of the Board of Appeals, which he adopted in this hearing. Tr. 11.

Mr. French testified that the special exception notice sign was still posted. Tr. 12. He also stated that the subject accessory apartment is the only one on his property. When Petitioners purchased the property, it already had the existing apartment, and Mr. French believes it was registered as certified living unit, licensed for a family member for approximately twenty years previous to his ownership.

Mr. French further testified that the garage has been converted into an apartment and is attached to the house on the eastern end of the property. Access to the house is through a driveway on Orchard Way, while the apartment is accessed from the south via an enclosed porch between the house and the apartment. Parking is behind the house on the east side of the lot. Tr. 13-19. The lot the house is on is 21, 778 square feet, and the home was built in 1953. He and his family reside in the main house. The current tenant of the accessory apartment is a schoolteacher. There are no other guest rooms or rental living units in the house. Tr. 20.

Mr. French described the neighborhood, apartment and the tenants. He purchased the property in February of 2001. The apartment is approximately 24 X 24 feet, and does have the same mailing address as the main dwelling. Tr. 21. It is currently occupied by a non family member who moved in January 1, 2005. The previous tenant, also a non family member, lived there from August, 2002 until December, 2004. Tr. 22. The neighborhood consists of one-family homes on one acre and half-acre lots.⁷ Generally speaking, the houses are of comparable size, including his own. Tr. 23-24.

Mr. French further testified that the apartment tenant would not create any additional activity, noise, disruption, vibration, lights or odors. Tr. 24. The application identified four parking spaces on the property, while the review process identified eight. He is not aware of any other apartments in the area. The property is on public water and sewer and all are working fine. Tr. 25. The apartment will not change the character of the neighborhood, nor adversely affect the health, safety, security or morals of workers or residents in the are. Mr. French agreed to the conditions in the housing inspection report if the application is granted. Tr. 26.

Housing Code Inspector Wright Jolly:

Housing Code Inspector Wright Jolly testified that he inspected the premises on June 4, 2004. The unit is located on the main level of the house, with the entrance at the rear of the building. The unit has 341 square feet of habitable space, and may not be inhabited by more that two unrelated people or a family larger than two. At the initial inspection, there was an issue regarding a double key lock, but that has been resolved. Everything thing else was found to be "in great shape." Tr. 27-29.

Sandra Youla, Technical Staff, M-NCCPC

Sandra Youla testified as to her qualifications as a land planner and her position with the M-NCPPC. She was accepted as an expert in land planning. Ms. Youla testified that her report, dated June 19, 2003 (Exhibit 12), accurately represents her assessment of the qualifications of this property for an accessory apartment, and she had nothing further to add. Tr. 29-31.

The Hearing Examiner asked Petitioners' attorney whether Petitioners would agree to a condition that allowed Petitioners to have the accessory apartment, if Petitioners met all the other criteria, but required Petitioners to forfeit the special exception if and when Lot 8 was ever transferred separately from Lot 3. Tr. 39-40. The record was held open until February

⁷ Mrs. French, who was also sworn in as a witness, contributed the fact that some of the local houses were on half-acre lots.

4, 2005, to give Petitioners' attorney time to respond to this question and to file evidence of the legislative history of Zoning Ordinance §59-G-2.00(c)(1). Petitioners' attorney responded on February 1, 2005, agreeing to such a condition and producing evidence of the legislative history. Exhibit 32.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded (Exhibit 12) that Petitioners' application satisfied all the requirements to obtain the special exception,⁸ except for the rear yard setback from the internal lot line, which is discussed as the central issue of this case in Part II.B. of this report.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below. As discussed in Part II.B. of this report, the Hearing Examiner finds that Technical Staff's concern about the rear yard setback from the internal lot line is satisfied by accepting DPS's interpretation of Zoning Ordinance §59-G-2.00(c)(1), which requires Petitioners' two lots to be treated as one for purposes of all development standards.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site." *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the "necessarily associated" characteristics of accessory apartments will be considered

⁸ Technical Staff also noted the need for filing a copy of the deed, and Petitioners have already met this condition (Exhibit 15).

inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments:

the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; provision of sufficient parking; the existence of an additional household on the site; additional activity from that household, including more use of the outdoor space and more pedestrian, traffic, and parking activity; and the potential for additional noise from that additional household.

The undersigned concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two. That is the case here. There are no unusual characteristics of the site. Technical Staff, in spite of their concern about the internal lot setback, also found no non-inherent adverse effects warranting denial.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, I conclude, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in this case and the testimony of the Petitioners and the Housing Code Inspector provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the RE-1 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific

standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the by the 1997 White Oak Master Plan. The property is zoned RE-1 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the RE-1 Zone. The Master Plan notes that the White Oak Master Plan area “offers a variety of housing,” and seeks to “continue to provide a variety of housing types.” Page 18. On the same page, the Plan recommends encouraging the development of “a variety of housing types for all income ranges.”

As noted by the Technical Staff, accessory apartments are a good source of affordable housing. Moreover, the Hearing Examiner takes official notice of a recent study by the M-NCPPC concluding that “[accessory apartments] can be an excellent solution to the shortage of affordable housing . . .”

The accessory apartment in the subject case fits the goals of the Master Plan. “Protection of [the] existing residential communities is the main housing objective of the Plan . . .” Page 6. In discussing

Special Exceptions (page 24), the Plan's stated objective is to "Evaluate New Requests for special exception uses and their impact on the character and nature of the residential neighborhoods in which they are proposed." In this case, because Petitioners plan no external structural modifications to the clearly residential subject property, the requested special exception will maintain the residential character of the area.

In sum, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the applicable Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because no structural change to the existing house is proposed. Technical Staff determined the proposed use will not generate any significant change in traffic conditions and that there is ample parking on site. Thus, this accessory apartment should have no impact on the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence in the record to contradict Technical Staff's conclusion that there will be no adverse effects on the neighborhood due to the accessory apartment; nor will it be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. Therefore, the Hearing Examiner so finds.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Petitioners plan no external changes to their residence, and Technical Staff found that the special exception would cause none of the listed adverse effects. Mr. French also so testified. Tr. 24. It is quite evident from the photographs in the record (Exhibits 6(b) and (c)) and from the Landscape Plan (Exhibit 7) that the accessory apartment will be well screened from the neighbors. Technical Staffer, Sandra Youla, stated in her testimony before the Board in June of 2003, that "this is just a great site," her only concern being the internal lot line setback issue already discussed. BOA Tr. 4. There is no evidence to the contrary, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: There is only one other active special exception (an accessory apartment) in the defined neighborhood.⁹ Neither the Technical Staff nor the Hearing Examiner believes that the proposed special exception will increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

⁹ The report mentions two other special exceptions, but there was no information about one of them (S-866) and the other (S-1388) had been revoked.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*
- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities. The Technical Staff notes in its Report (Exhibit 12) that “[t]he adequacy of public facilities for the one-family detached dwelling on the subject property was determined at the time of subdivision review.” Technical Staff determined that “traffic conditions will not be affected adversely” by the proposed use, and that the proposed use “will not reduce the safety of vehicular or pedestrian traffic.” Based on this evidence, the Hearing Examiner so finds.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 12), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) *Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) *The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) *The lot is 2 acres or more in size; and*
- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the former attached garage of an existing house, and therefore shares a wall in common. Moreover, the combined lots exceed an acre approximately (48,368 square feet = 1.1 acre). Thus, the proposal meets this standard whether the lots are considered separately or together.

- (3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No addition or extension of the main dwelling is proposed beyond the existing one.

- (4) *The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The original house was built in 1953. Tr. 20. It therefore meets the "5 year old" requirement.

- (5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed*

- residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use does not violate any of the provisions of this subsection. Tr. 20-23.

- (6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: There will be no change to the residential appearance of the dwelling. A separate entrance to the accessory apartment is located at the rear of the house on the ground floor. The entrance is within a shared, enclosed porch, and thus is not visible from the street. Hence, the single-family appearance of the home is preserved.

- (7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No external modifications are proposed.

- (8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: The accessory apartment is clearly subordinate to the main dwelling, as it occupies approximately 576 square feet (of which 341 square feet are habitable) in the former garage of Petitioners' home.

59-G § 2.00(b) Ownership Requirements

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioners live in the main dwelling with their family.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the*

Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.

Conclusion: The Petitioners acquired the property in 2001, according to the testimony (Tr. 22) and the deed (Exhibit 15), more than one year before the filing of the petition.

(3) Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.

Conclusion: The Petitioners will receive compensation for only one dwelling unit.

(4) For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.

Conclusion: The Petitioners are the owners of the property. Exhibit 15.

(5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.

Conclusion: Not applicable

59-G § 2.00(c) Land Use Requirements

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The combined lots are over an acre, and each of the lots is more than the required 6,000 square feet in size. The house itself is on Lot 3, which is 21,778 square feet. The following chart demonstrates compliance with all development standards in the "A" Residence Zone (Exhibit 29):

Development Standard – “A” Residence Zone per 1945 Ordinance	Required/ Allowed	Provided	Compliance
Maximum Building Height:	3 stories or 40 feet	1½ stories	Yes
Minimum Width at Front Building Line:	50 feet	160 feet	Yes
Minimum Front Yard Setback:	25 feet provisions)	79 feet	Yes
Minimum Side Yard Setback:	7 feet each side	48 feet	Yes
Minimum Rear Yard Setback:	Min. avg. Depth of 20 feet, but in no case less than 15 feet.	Between 10.24 feet and 19.8 feet for Lot 3 alone, but over 143 feet if the lots are considered together	Yes

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: There is only one other accessory apartment in the area. Both the Technical Staff and the Hearing Examiner conclude that the proposed special exception will not create an excessive concentration of similar uses.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: There is room for a total of twelve to fourteen off-street parking spaces in Petitioners' driveway, extended driveway and rear parking area, according to Technical Staff.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report (Exhibit 11(a)) has recommended that occupation of the accessory apartment be limited to no more than two unrelated persons, or a family of two. As noted above, Petitioners have agreed to meet this condition.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2573 for a special exception for an accessory apartment located at 507 Orchid Way, Silver Spring, Maryland, be GRANTED, with the following conditions:

6. The Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witnesses and representations of counsel identified in this report.
7. The Petitioners are bound by the condition set out in the Memorandum of Wright A. Jolly, Jr., Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 11(a)), that Petitioner will house no more than two unrelated persons, or a family of two, in the accessory apartment;
8. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
9. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and
10. Petitioners shall forfeit the accessory apartment special exception if and when title or development rights to Lot 8 are ever transferred separately from Lot 3 or if Lot 8 is itself developed independently from Lot 3.

Dated: February 28, 2005

Respectfully submitted,

Martin L. Grossman
Hearing Examiner